State Immunity and *Jus Cogens* Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the 'Law of Nations'

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I. INTRODUCTION

On 23 December 2008, Germany instituted proceedings before the International Court of Justice (ICJ) against Italy.[1] In its Application to the Court, Germany contended that Italy should bear international responsibility for the conduct of its judiciary, which had "repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State."[2] The dispute arose out of a series of judgments delivered in the last few years by the Italian Supreme Court (Corte di Cassazione). In those rulings, the Corte di Cassazione held that Germany was not entitled to sovereign immunity before the Italian Courts in cases where plaintiffs were seeking civil redress for acts committed by the Third Reich in violations of peremptory norms of international law (*jus cogens*).

This currently pending case presents the ICJ with the opportunity to clarify the state of the art in international law on the relationship between sovereign State immunity and *jus cogens* violations, a topic which has been extensively

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1. ICJ Press Release no. 2008/44, (Dec. 23, 2008), *available at* www.icj-cij.org. Germany brought the case under Article 1 of the 1957 European Convention for the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.S. 243, 244 (which provides for the parties to submit "any international legal dispute" to the Court).

2. Jurisdictional Immunities of the State (Germany v. Italy), Application of the Federal Republic of Germany, December 2008, at 2.

debated in the last decades amongst scholars, as well as examined by a number of domestic and international courts. The ruling by the ICJ could also have an impact within the U.S. domestic context, where the relationship between *jus cogens* and state immunity has been argued many times before the courts, mostly in the context of suits brought under the Alien Tort Statute (ATS). While in Italy there is formally no statutory mechanism similar to the ATS, the rulings by the Corte di Cassazione allowing suits for civil damages against torts committed in violation of international law make those proceedings structurally very similar to suits brought under the ATS. It is therefore reasonable to expect that the forthcoming ICJ judgment might contribute to discussions on the possibility for U.S. courts to hear complaints of gross human rights violations against foreign States in the context of ATS claims.

Part II of this article will begin with a description of the relationship between the ATS and State immunity.[3] After a brief examination of the concept of sovereign immunity within the U.S. context, and an analysis of the scope of the Foreign Sovereign Immunities Act (FSIA) of 1976, this section will turn to the question of the interplay between the ATS and the FSIA.

Part III will address the current stance of U.S. case law as to the issue of State immunity and allegations of *jus cogens* violations brought under the ATS. As will be seen, plaintiffs in ATS cases have often resorted to the "implied waiver" exception to immunity to argue in favor of the existence of a *jus cogens* exception under the FSIA. Courts have almost invariably been unwilling to follow that path.

Part IV will explore in some detail the attitude of non-American courts to the issue of state immunity for violations of peremptory norms of international law. The most important decisions by national (Italian, Greek, British, and other jurisdictions) and international (European Court of Human Rights) courts will be taken into consideration. This part of the article will discuss whether a norm of customary international law has developed to the extent of denying foreign state immunity in cases of civil suits based on *jus cogens* violations brought before domestic courts of another state.

The final part of the article will provide some brief conclusions on the current status of customary law with respect to the issue of *jus cogens* and state immunity, and on its possible impact within the U.S.

II.
THE RELATIONSHIP BETWEEN THE ATS AND THE FSIA

A. Sovereign Immunity in the U.S.: The Path to the FSIA

The foundation of the rule whereby states enjoy immunity from the

3. This article does not address the relationship between the ATS and the immunity of state officials.

jurisdiction of domestic courts of other states is usually found in the principles of sovereign equality, independence, and dignity of states, as well as in foreign relations considerations.[4]

In the U.S., the principle was first affirmed in 1812 by the Supreme Court in *The Schooner Exchange*, where Chief Justice Marshall linked the principle of foreign state immunity to "[the] perfect equality and absolute independence of sovereigns."[5] International law at that time was characterized by the concept of "absolute immunity," *i.e.*, the sovereign was completely immune from foreign jurisdiction in all instances regardless of the type of governmental conduct at issue in the case. Although "the narrow holding" in *The Schooner Exchange* did not announce a rule of absolute sovereign immunity,[6] absolute immunity prevailed in practice over the ensuing 140 years because the courts consistently deferred to the Executive Branch, which applied the principle *par in parem non habet imperium* and "ordinarily requested immunity in all actions against friendly foreign sovereigns."[7]

The pivotal "Tate letter" of 1952 signaled the shift from the doctrine of absolute immunity to the theory of restrictive immunity.[8] Under this theory, immunity was confined to suits involving the foreign sovereign's public acts (*acta jure imperii*), and did not extend to cases arising out of a foreign state's strictly commercial acts (*acta jure gestionis*).[9] The Tate letter brought the U.S. within the then-emerging consensus among capitalist States around the restrictive doctrine. Belgian and Italian case law had already abandoned absolute immunity in the last decades of the 19th century and the first decades of the 20th century, and French and German courts followed suit some decades thereafter.[10] Even in the years following the Tate letter, however, immunity decisions continued to be made on a case-by-case basis by the U.S. State Department and communicated to courts through "suggestions of immunity." As a consequence, foreign states were often able to place diplomatic pressure on

4. *See generally* MALCOLM NATHAN SHAW, INTERNATIONAL LAW 621 (2003); Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSNAT'L L. 1 (1986).

5. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812).

6. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

7. *Id.* In the U.S., foreign sovereign immunity is viewed not as rule of customary international law, but rather as a matter of "grace and comity." *See id.* ("As *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution"). *See also* Republic of Austria v. Altmann, 541 U.S. 677, 689 (9th Cir. 2004).

8. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-985 (1952), and in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, app. 2 at 711 (1976).

9. *Verlinden B.V.*, 461 U.S. at 487.

10. *See* Riesenfeld, *supra* note 4 (reporting on non-U.S. case law – in particular French, German and Italian – on the topic of restrictive immunity). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW ch. 5, introductory note (1987).

the State Department when seeking immunity.[11]

With the goal of reforming this situation of political pressure and uncertainty, Congress enacted the FSIA in 1976.[12] The power to make sovereign immunity decisions was thus transferred from the executive to the judicial branch. As a result, the executive branch was freed from the case-by-case diplomatic pressures, and furthermore, decisions would now be made by courts on purely legal grounds and under procedures that would ensure due process.

As the Supreme Court held in *Verlinden*, the FSIA codifies "for the most part" the doctrine of restrictive immunity.[13] It gives federal district courts subject-matter jurisdiction over all civil actions against a foreign state, so long as the state is not entitled to foreign sovereign immunity by statute or treaty. The statute is centered around a rebuttable presumption of immunity. Pursuant to § 1604 of the FSIA, foreign states, including their agencies and instrumentalities, are entitled to immunity from the jurisdiction of both federal and state courts in the U.S., unless the claim is governed by an international agreement to which the U.S. was a party when the FSIA was enacted or falls in one of the exceptions listed in §§ 1605 to 1607 of the statute. For instance, the foreign state will not enjoy immunity in the event that it has explicitly or impliedly waived its immunity;[14] the action is based upon a commercial activity carried on by the state in the U.S.;[15] or it concerns certain non-commercial torts within the U.S.[16] If the court finds one of the exceptions listed in the FSIA to apply, then pursuant to § 1606 FSIA "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."

B. The Interplay Between the ATS and the FSIA: Argentine Republic v. Amerada Hess

Private parties who have suffered damages as a result of foreign states' violations of international law have tried to circumvent the application of the FSIA through the use of the ATS. The ATS, in fact, provides district courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[17]

Jurisdiction under the ATS over a foreign state was first exercised in 1985 in *Von Dardel v. U.S.S.R.*[18] In *Von Dardel,* the plaintiffs sued the Soviet Union

11. *Verlinden B.V.*, 461 U.S. at 487.

12. Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1330, 1602-11 (1976) [hereinafter FSIA].

13. *Verlinden B.V.*, 461 U.S. at 488.

14. FSIA § 1605 (a)(1).

15. FSIA § 1605 (a)(2).

16. FSIA § 1605 (a)(5).

17. 28 U.S.C. § 1350 (1982).

18. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985).

for the arrest and subsequent disappearance of Swedish diplomat Raoul Wallenberg in Hungary in early 1945. The district court held that the FSIA did not preclude jurisdiction over the Soviet Union, based on several grounds. With regard to the ATS, the court found that the statute did indeed apply because interfering with a diplomat violated both contemporary international law and the law of nations at the time the statute was enacted.[19]

In 1989 the U.S. Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.* had the chance to rule on the relationship between the ATS and the FSIA.[20] The case arose out of an event that occurred during the Falkland/Malvinas war between the United Kingdom and Argentina. The Liberian oil tanker Hercules was repeatedly bombed by Argentine aircraft in international waters, incurred extensive damages, and had to be eventually scuttled off the Brazilian coast. The two Liberian corporations that owned and chartered the tanker sued Argentina in the U.S. District Court for the Southern District of New York, claiming jurisdiction, *inter alia*, under the ATS.[21] The district court dismissed the suit, holding that Argentina was immune under the FSIA and that it was not empowered to create an *ad hoc* exception to a congressional statute in order to hear the case.[22] A divided panel of the U.S. Court of Appeals for the Second Circuit reversed.[23] It found in the ATS an independent basis for jurisdiction over the claim. In the court's reasoning, Congress could not have intended to exempt foreign states from the jurisdiction of U.S. courts when those foreign states had committed "violations of international law."[24] The Supreme Court granted certiorari. Arguing from the "comprehensiveness of the statutory scheme of the FSIA," the Court unanimously held that the text and structure of the FSIA demonstrated Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.[25] The Court found that none of the immunity exceptions applied in the case at bar. Moreover, the Court noted that Congress had considered violations of international law—and not just commercial concerns—when it enacted the FSIA. As an example, the Court pointed to the exception that denies immunity in suits "in which rights in property taken in violation of international law are in issue."[26] Therefore, the Court concluded that Congress must have intended to grant immunity in cases involving

19. *Id.* at 256-59.

20. 488 U.S. 428 (1989).

21. Plaintiffs had also brought suit under the general admiralty and maritime jurisdiction (28 U.S.C. § 1333) and "the principle of universal jurisdiction, recognized in customary international law." *Id.* at 432.

22. Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986).

23. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

24. *Id.* at 426-27.

25. *Amerada Hess*, 488 U.S. at 434.

26. *Id.* at 435-36.

violations of international law.[27]

The Court's ruling certainly resolved some of the major uncertainties arising from the interplay between the ATS and the FSIA. First of all, it clarified that the ATS cannot be used to override the presumption of immunity granted to foreign states by the FSIA and that the conduct that is attributable to the state and which has caused damages to plaintiffs needs in any case to fall within one of the exceptions set forth in the statute. Second, it made clear that the FSIA also covers violations of international law, and that states therefore continue to enjoy immunity even in cases of such violations.

III.
THE *JUS COGENS* EXCEPTION IN U.S. COURTS

The Supreme Court decision in *Amerada Hess*, however, did not touch upon the issue of *jus cogens*. The definition of *jus cogens* can be found in Art. 53 of the Vienna Convention on the Law of Treaties, which reads: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[28]

U.S. courts called to examine allegations of *jus cogens* violations usually refer to a dictum from the D.C. Circuit, which noted that "[s]uch [peremptory norms of international law], often referred to as *jus cogens* (or "compelling law"), enjoy the highest status in international law and prevail over both customary international law and treaties."[29]

Amerada Hess did not involve allegations of gross and systematic human rights violations or torture (commonly held to constitute examples of *jus cogens* violations). It concerned Argentina's bombing of a neutral merchant ship, which plainly does not amount to a violation of a peremptory norm of international law. It might therefore be asked whether a violation of peremptory norms of international law would have warranted a different ruling by the Supreme Court in terms of the possible denial of immunity.

In U.S. courts, the debate surrounding the possible denial of state immunity in cases of violations of peremptory norms of international law has developed around the topic of waiver of immunity.

As has been already noted, one of the exceptions to immunity set forth in the FSIA – indeed the first one on the list – concerns the case where the foreign state has waived immunity. Section 1605 FSIA provides that:

(a) A foreign state shall not be immune from the jurisdiction of courts of the

27. *Id*.

28. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

29. Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988).

> United States or of the States in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

Plaintiffs have tried to circumvent the application of the FSIA's presumption of immunity by arguing before U.S. courts that because observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation implicitly waives its immunity by violating such fundamental norms. They thus followed a suggestion which had been developed in early scholarly commentary, in which the authors had criticized the Supreme Court in *Amerada* for not having recognized that suits alleging violations of peremptory norms of international law could be brought under the FSIA itself, using the FSIA's implied waiver provision.[30] This argument rested upon the idea that the changing structure of the international legal system, with its recognition that individuals enjoy certain rights under international law, dictated an evolutionary approach to the doctrine of sovereign immunity. Under this perspective, the rise of the concept of *jus cogens* requires that municipal courts deny sovereign immunity when a state's violation of a rule of *jus cogens* injures an individual. Since Congress intended the FSIA to be informed by international law, the FSIA should respond where possible to those continuing developments under international law, and the implied waiver provision constitutes a possible mechanism for incorporating such developments.[31]

The first case considering the relationship between *jus cogens* and sovereign immunity in depth was *Siderman De Blake v. Argentina*.[32] The Ninth Circuit, despite finding that the allegations leveled against Argentina – torture – amounted to violations of *jus cogens*, deemed this circumstance not sufficient to confer jurisdiction under the FSIA. The court, interpreting the FSIA "through the prism of *Amerada Hess*," found that the FSIA did not "specifically provide for an exception to sovereign immunity based on *jus cogens*."[33] Although the Ninth Circuit acknowledged that *Amerada Hess* had not been concerned with *jus cogens* violations, it found the Supreme Court's approach to the interpretation of the FSIA to require an express statutory *jus cogens* exception in order to override immunity. "If violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so."[34]

30. Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365 (1989).

31. *Id*. at 397.

32. Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992).

33. *Id.* at 718.

34. *Id.* at 719. The court found, however, that Argentina had waived its immunity by using the assistance of American courts. *Id.* at 720-22. The Second Circuit in Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996), criticized *Siderman* for reasoning that "the Supreme Court's decision in *Amerada Hess* precludes viewing *jus cogens* violations as an implied waiver." According to the Second Circuit "[t]hat contention is questionable since no claim

The next and most often discussed case, *Princz v. Federal Republic of Germany*, decided by the D.C. Circuit in 1994, concerned allegations of deportation and forced labor in Nazi concentration camps suffered by a Jewish-American Holocaust survivor.[35] Along the same line as *Siderman*, the court did not deny Germany immunity based on the implied-waiver-*jus-cogens* theory. The court stated that "something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world . . . ."[36] Judge Wald dissented, and argued that by engaging in violations of *jus cogens* norms Germany had implicitly waived its immunity from suit. Following her reasoning, denial of immunity would appear to ensue from the superior position enjoyed by *jus cogens* norms, which "[sit] atop the hierarchy of international law" and "enjoy the greatest clout, preempting both conflicting treaties and customary international law."[37]

Judge Wald's dissent has not enjoyed success in the ensuing practice of U.S. courts. Several district and circuit courts have concluded that, although the argument for a *jus cogens* exception through the implied waiver mechanism might appear "appealing" and not devoid of "emotional power,"[38] it was not persuasive enough to deny immunity.[39] Courts have usually examined the "waiver by implication" exception by starting from the relevant examples provided in the House Report:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsible pleading in an action without raising the defense of sovereign immunity.[40]

Although those advocating in favor of a recognition of a *jus cogens* exception under the implied waiver clause have argued that the list provided by the House Report "is by no means comprehensive,"[41] courts have usually held that the examples from the House Report suggest a close relationship with the litigation process.[42] For instance, the Second Circuit in *Smith* noted that

of waiver arising from a *jus cogens* violation was made in *Amerada Hess*." *Id*. at 245.

35. Princz v. F.R.G, 26 F.3d 1166, 1176 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995).

36. *Id.* at 1174, n.1.

37. *Id.* at 1180.

38. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242, 244 (2d Cir. 1996).

39. *Id.* at 244. *See also* Hana Hilsenrath v. the Swiss Confederation, 2007 U.S. Dist. LEXIS 81118 (N.D. Cal. Oct. 23, 2007); Hwang Geum Joo, et al. v. Japan, 332 F.3d 679 (D.C. Cir. 2003).

40. H.R. REP. NO. 1487 at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610-11 at 6617.

41. Belsky et al., *supra* note 30, at 395.

42. *See Princz*, 26 F.3d at 1174 (arguing that "an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit"). *See also Smith*, 101 F.3d at

"examples are persuasive evidence that Congress primarily expected courts to hold a foreign state to an implied waiver of sovereign immunity by the state's actions in relation to the conduct of litigation."[43]

This argument is usually accompanied by the statement that a waiver has to be construed narrowly.[44] This position appears to be in line with recent developments in the codification work carried out by the International Law Commission (ILC). The ILC dealt in recent years with the topic of "unilateral acts of states," which was first put on its agenda in 1996 and ended with the approval of a set of "Guiding Principles" in 2006.[45] Amongst the unilateral acts of states which the ILC considered, waivers constituted one of the most-used examples.[46] In addressing the standard of interpretation governing unilateral acts, the ILC stressed the need, amongst other criteria, to adopt a "restrictive" canon of interpretation.[47]

U.S. courts have therefore correctly rejected the use of the waiver exception as a sort of back-door through which violations of *jus cogens* norms can be adjudicated by domestic courts.[48] The idea that a state, by way of gross misconduct, automatically waives immunity before foreign courts to which it is entitled would in fact appear to be untenable and does not find any support in the current practice of domestic courts of other States, with the exception of a single Greek court decision addressed in the following section.

IV.
NATIONAL AND INTERNATIONAL JUDICIAL PRACTICE ON *JUS COGENS* AND STATE IMMUNITY

The following section will review domestic and international case law dealing with the relationship between *jus cogens* and state immunity.

243-44; Certain Underwriters at Lloyds London, et al. v. Great Socialist People's Libyan Arab Jamahiriya, 2007 U.S. Dist. LEXIS 49032 (D.C. Cir. Dec. 14, 2007), at 8-9; Sampson v. F.R.G., 250 F.3d 1145, 1154 (7th Cir. 2001).

43. *Smith*, 101 F.3d at 243-44.

44. *Id.* at 243 (citing Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Joseph v. Office of the Consulate General of Nig., 830 F.2d 1018, 1022-23 (9th Cir. 1987); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985))

45. *See* GUIDING PRINCIPLES APPLICABLE TO UNILATERAL DECLARATIONS OF STATES CAPABLE OF CREATING LEGAL OBLIGATIONS (International Law Commission 2006), *available at* http://www.un.org/law/ilc [hereinafter "ILC Guiding Principles"].

46. *See*, *e.g.*, Special Rapporteur, *Seventh report on unilateral acts of States*, ¶¶ 80, 88, U.N. DOC. A/CN.4/542, (Apr. 22, 2004).

47. *See* ILC Guiding Principles, Principle 7.

48. *See* Richard Garnett, *The Defence of State Immunity for Acts of Torture*, 18 AUSTL. Y.B. INT'L L. 97, 106-115 (1997) (assessing U.S. practice on foreign sovereign immunity for acts of torture).

A. Italian Case Law: Ferrini v. Germany

The judgment delivered in 2004 by the Italian Corte di Cassazione in *Ferrini* was the first case in which the Italian courts addressed the issue of the relationship between foreign state immunity and violations of fundamental human rights norms, expressly invoked by the plaintiff.[49] The plaintiff had been captured in 1944 on Italian soil by Nazi troops, deported to a German concentration camp, and used for forced labor at German firms. In 1998 he instituted proceedings before Italian courts to claim damages on account of his imprisonment, deportation and forced labor. The Court of first instance held that jurisdiction was barred by the application of the international norm guaranteeing foreign state immunity for those acts performed by states in the exercise of their sovereign powers, such as acts of war. The Court of Appeals upheld the finding of the lower court. The Corte di Cassazione reversed and held that a foreign state cannot enjoy immunity in respect to sovereign acts that can be classified as "international crimes."

It is useful to recapitulate the main passages in the reasoning of the Corte di Cassazione. The Court started from the assumption that there is a rule on the international plane that accords foreign states immunity from jurisdiction in domestic courts of another state. According to the Court, this norm is part of customary international law, and is therefore automatically operative within the Italian legal system through Art. 10(1) of the Italian Constitution.[50] This provision is understood by scholars and the judiciary to impose on courts an obligation to automatically and directly apply the entire corpus of customary international law as if it were domestic law.[51]

The Court acknowledged that the acts committed by Germany, as acts of war, were acts *jure imperii*. However, it immediately turned to the question of

> whether immunity from jurisdiction is capable of operating even in respect of conduct which . . . is so extremely serious that, in the context of customary international law, it belongs to that category of international crimes which are so prejudicial to universal values that they transcend the interest of individual States.[52]

The first step in the Court's reasoning was to try to demonstrate that deportation and forced labor are international crimes under customary international law. As evidence of that, the Court cited various sources (United Nations General Assembly resolutions, the Nuremberg judgments, the ILC Principles of International Law of 1950, the Security Council resolutions establishing the *ad hoc* international criminal tribunals, the statutes of the two *ad*

49. Ferrini v. Repubblica Federale di Germania, Cass., sez. un., 11 mar. 2004, no. 5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE 539 (2004) (English translation available at 128 I.L.R. 658 (2004)) [hereinafter *Ferrini*].

50. *Id.* para. 5.

51. *See* Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The* Ferrini *Decision*, 54 INT'L & COMP. L.Q. 951, 951-52 (2005).

52. *Ferrini*, para. 7.

hoc tribunals, the Rome Statute establishing the International Criminal Court). It then devoted its attention to what was at that time the most important judicial precedent of a Court recognizing the overriding effect of *jus cogens* over state immunity: the case decided by the Greek Supreme Court in *Prefecture of Voiotia v. Germany*.[53] In that case, the Greek Supreme Court had held that the violation by Germany of peremptory norms designed to protect fundamental human rights implied a waiver of the benefits of state immunity. The Italian Corte di Cassazione in *Ferrini* criticized the reasoning of the Greek Court. According to the Corte di Cassazione, waiver of immunity must be concretely proven, not abstractly presumed, and it appears unlikely that a State which commits serious violations wishes to waive those benefits from which it derives immunity from jurisdiction.[54] Although critical of the waiver argument resorted to by the Greek Court, the Corte di Cassazione nonetheless reached the same conclusion, i.e. it denied state immunity, but based on other grounds. The Court pointed out that there is an incompatibility within the international legal order between the principle of immunity on the one hand, and the fundamental rights of the human being, protected by norms which prohibit international crimes and impose certain reaction and repression obligations on states, on the other hand. The heart of the Court's argument is that *jus cogens* norms such as those protecting human rights are at the peak of the international legal order, and they therefore prevail over all other treaty or customary rules, including those pertaining to state immunity.[55] Granting immunity to states in such situations would mean hindering, rather than furthering, the protection of those values which must be considered fundamental for the international community as a whole.[56]

B. Subsequent Cases Decided by the Italian Corte di Cassazione

The landmark decision in *Ferrini* was subsequently re-affirmed by the Corte di Cassazione in later judgments. In particular, in a series of rulings of almost identical content delivered on May 29, 2008, the Court upheld its earlier position and expanded upon it.[57] Once more, jurisdiction over Germany for acts

53. The Greek Supreme Court denied immunity to Germany in its May 4, 2000, decision. *See* Maria Gavouneli & Elias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 95 A.J.I.L. 198 (2001). The decision was reversed by the Greek Special Supreme Court on September 17, 2002; *see* Elena Vournas, *Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exception for* Jus Cogens *Violations*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 648 (2002).

54. *Ferrini*, para. 8.2.

55. *See* Andrea Gattini, *War Crimes and State Immunity in the* Ferrini *Decision*, 3 J. INT'L CRIM. JUST. 230 (2005).

56. *Ferrini*, para. 9.1.

57. *See* the fourteen rulings delivered by the Italian Corte di Cassazione on May 29, 2008 (Judgment No. 14199 and Order Nos. 14200 to 14212), *reported by* Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*, 103 A.J.I.L. 122, 128 (2009). Reference will be made to the paragraphs of one of those rulings: Federal Republic of Germany v. Mantelli, Cass.,

committed during World War II was affirmed and the plea of sovereign immunity denied. Although the outcome of those cases is the same as in *Ferrini*, the Court took a more cautious and balanced approach. In the May 29, 2008, rulings, the Court said it was aware that, in denying Germany immunity with respect to *jus cogens* violations, it was not applying an already existing norm of customary international law but rather contributing to its formation in a framework of legal uncertainty.[58] Further, the reasoning suggested that the Court, despite invoking the normative hierarchy that characterizes *jus cogens*, was reaching its conclusions based not on a purely formal priority of *jus cogens*, but on a systematic interpretation of the international legal order in light of its substantial fundamental values.[59]

In a later judgment delivered on January 13, 2009, the Court made it clear that it was adhering to the positions that it had expressed in former judgments, and that denial of immunity for *jus cogens* violations should now be considered a "firm stance" in its case law.[60]

C. Critical Remarks on Italian Case Law

The judgments by the Corte di Cassazione analyzed above (especially the decision in *Ferrini*) are well-structured and full of references to national (including U.S.) and international case law, as well as to domestic legislation of other states, treaties, and other international acts. The Court also examined the work carried out by the ILC on State responsibility. It referred to Articles 40 and 41 of the ILC Draft Articles, and showed how the requirement to uphold values of particular importance, such as those violated through the commission of individual crimes, leads to deep changes in terms of state responsibility. As noted by commentators, the Court emphasized that the idea that such grave violations must bring about a qualitatively different (and stronger) reaction than that arising from other wrongful acts is becoming better established also in relation to states.[61]

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sez. un., 29 may 2008, n.14201, *reprinted in* 45 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 651 (2009) [hereinafter *Mantelli*]. It has to be mentioned that one of the rulings, namely Judgment No. 14199, addressed the issue of whether Italy should recognize the Greek Special Supreme Court decision requiring Germany to pay litigation expenses in the case discussed above in Part IV A. *See also* the European Court of Justice's Judgment in Case C-292/05, Lechouritou v. F.R.G., 2005 E.C.R. 243 (excluding claims for compensation for acts perpetrated by armed forces in the course of warfare from the scope of the Brussels Convention of September 27, 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters).

58. *Mantelli*, at 654-55.

59. *See* Focarelli, *supra* note 57, at 128. It is worth noting that, while the Corte di Cassazione in *Ferrini* (para. 10) appeared to place great importance on the argument that the alleged crimes had been partly committed in the forum state, the same argument appeared less weighty in the May 2008 rulings. *See id.* at 126.

60. *See* Corte di Cassazione, 13 Jan. 2009, No. 1072, *reprinted in* 92 RIVISTA DI DIRITTO INTERNAZIONALE 619, 626 (2009).

61. *See* Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The*

Despite the remarkable efforts shown by the Court towards a systematic interpretation of the international legal order, the judgments are not devoid of significant weaknesses.

A first criticism concerns the use by the Court of the concept of "international crimes." The Court does not appear to distinguish between the individual dimension (*i.e.*, criminal responsibility of individuals under international law) and the state dimension (the wrongful act of the state of committing particularly grave violations of international law, once labeled "international crime of the state").[62] The way these concepts are used by the Court is very general, and serves the purpose of demonstrating the increasing legal role played by the value of human rights protections within the international legal system, which should not give way to immunity from jurisdiction.[63]

However, the major criticism of the Court's reasoning concerns the main argument that *jus cogens* is able to trump sovereign immunity. The conclusions reached by the Court on that point do not seem to reflect the current status of customary international law. Certain international rules may be aimed at protecting fundamental values of the international community as a whole and therefore be peremptory. However, it does not follow that the alleged violation by one state allows courts of another state to deny immunity to the former.[64] The only norm which is higher in the hierarchy is the one having substantive content, that is, the norm prohibiting acts which violate fundamental rights of the human being. Implying, as the Court does, that the importance of a norm in terms of protected values automatically entails procedural effects, such as the denial of immunity, does not appear correct, at least in the absence of state practice in this regard.

A similar "deductive" approach, aimed at presupposing special procedural effects from the scope of substantive *jus cogens* norms, has been recently rejected by the ICJ in the *Armed Activities* judgment of February 3, 2006.[65] The ICJ had to determine whether the alleged violation of *jus cogens* norms, *i.e*. the prohibition of genocide and of racial discrimination, implied its jurisdiction even though the defendant state had not given its consent by attaching a reservation to the compromissory clause of the treaty on which the ICJ's jurisdiction was based. The Court noted that "assuredly" the prohibition of genocide has a *jus cogens* character.[66] However, it found that this could not "of itself provide a

Italian Supreme Court Decision on the Ferrini *Case*, 16 EUR. J. INT'L L. 89, 100 (2005).

62. *See* Gattini, *supra* note 55, at 229-30.

63. *See* De Sena & De Vittor, *supra* note 61, at 110.

64. *See* Focarelli, *supra* note 57, at 126.

65. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Feb. 3, 2006, *available at* www.icj-cij.org [hereinafter *Armed Activities*]. *See also* Carlo Focarelli, *Promotional* Jus Cogens*: A Critical Appraisal of* Jus Cogens' *Legal Effects*, 77 NORDIC J. OF INT'L L. 429, 431-433 (2008).

66. *Armed Activities*, para. 64.

basis for the jurisdiction of the Court to entertain" the dispute.[67] Commentators have pointed out that the ICJ "excluded that *jus cogens*' 'special' effects can be inferred by way of logical implication and more specifically that procedural effects could be drawn from the nature of substantive norms."[68]

It would be reasonable to argue in a similar way with regard to immunity in cases of *jus cogens* violations, and to consider the two sets of rules as addressing two different perspectives, which do not interact with each other. A substantive *jus cogens* prohibition does not necessarily encompass the further *jus cogens* rule which grants the forum state the right to deny immunity to the respondent state.[69] Unlike what the Corte di Cassazione appears to think, upholding such a view does not give rise to any incoherence in the international legal system. As has been noted, incoherence would only arise if one were to assume that the right of access to justice itself constitutes a *jus cogens* norm or that a violation of peremptory norms necessarily entails the right to civil redress.[70] Neither assumption appears to be supported by international practice.

Italian case law thus seems to have gone too far in recognizing that *jus cogens* norms entail the specific effect of denial of sovereign immunity. The Corte di Cassazione appeared to become aware of that in the May 2008 rulings, where it held that it was contributing to the emergence of a (new) rule, rather than simply stating or applying an already existing one. The case law of the Corte di Cassazione can thus be seen as an attempt to influence the process of transformation of current customary international law such that it would be more in harmony with the protection of those fundamental values which appeared to be at the core of the Court's concerns. There is nothing anomalous in this. A state's "deviating" conduct will necessarily be seen as an unlawful act at the beginning. However, if that conduct is followed by other states in a sufficiently consistent way and with the belief that such behavior depends on a legal obligation, a new customary rule with that specific content may be formed.[71]

D. Domestic and International Judicial Practice Other than Italian on Jus Cogens and State Immunity

To be able to recognize a new rule of customary international law as the one that the Corte di Cassazione in *Ferrini* thought it was able to find (or to the emergence of which it wanted to contribute, as it held in later judgments), one has to look to whether there is consistent state practice on this issue. The main

67. *Id.*

68. *See* Focarelli, *supra* note 65, at 432.

69. Andreas Zimmermann, *Sovereign Immunity and Violations of International* Jus Cogens – *Some Critical Remarks*, 16 MICH. J. INT'L L. 433, 438 (1995).

70. *See* Gattini, *supra* note 55, at 236-37.

71. On issues of formation of customary international law, *see* Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *available at* www.mpepil.com.

problem with the position taken by the Italian Supreme Court is that judicial practice of other states (as well as of international courts) appears to be exactly opposite to the conclusions reached by the Corte di Cassazione.

The only precedent that has denied immunity was the already quoted case decided by the Greek Supreme Court in 2000,[72] whose conclusions the Corte di Cassazione has shared, although it criticized the reasoning behind it. Even in that case, however, the subsequent enforcement proceeding in Greece failed and immunity was upheld: The Greek Ministry of Justice blocked the enforcement of the judgment by denying the necessary authorization, and the Supreme Court of Greece confirmed the correctness of such a denial.[73]

All other practice has invariably granted immunity. In the famous *Al-Adsani* judgment, the European Court of Human Rights recognized that torture is an international crime and that the prohibition of torture belongs to *jus cogens*.[74] However, it held that in the absence of practice in favor of denial of immunity, granting immunity to the state was "not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity."[75] A minority opinion was appended to the Court's judgment. The group of dissenting judges took the position that, if a norm enjoys *jus cogens* character, then it is hierarchically superior to any other international norm not having the same status, with the consequence that the *jus cogens* norm trumps the "ordinary" customary international rule on immunity.[76]

Canadian, German, and French higher courts also have refused to deny immunity on the basis of *jus cogens* violations.[77] The House of Lords decision in *Jones and Mitchell v. Saudi Arabia* of 2006 provides a good example of the reasoning that would appear to be more in line with the current status of customary international law on this issue.[78] The House of Lords took *Ferrini* into consideration and heavily criticized it. The English judges acknowledged that torture was prohibited by *jus cogens*, but refused to infer from the peremptory character of such norms the procedural consequence that jurisdictional immunity had to be denied.[79] In other words, the House of Lords correctly considered the two sets of norms as having two different objects.

72. *See supra* Part IV A.

73. S*ee* Vournas, *supra* note 53.

74. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79.

75. *Id.* at para. 66.

76. *See id.* (joint dissenting opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic. *See also* Kalogeropoulou v. Greece, App. No. 59021/00 (Eur. Ct. H.R. Dec. 12, 2002) (admissibility).

77. *See* cases quoted in Focarelli, *supra* note 57, at 124.

78. Jones v. Ministry of Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, *noted in* Elina Steinerte & Rebecca Wallace, *Untitled,* 100 A.J.I.L. 901 (2006).

79. *Jones*, [2006] UKHL 26, at para. 49.

V.
CONCLUSIONS

The examination of domestic and international practice on the issue of the relationship between *jus cogens* violations and state immunity shows that the stance taken by Italian courts appears to be (at least for the time being) an isolated position on the international level. Practice appears in fact to lean towards the opposite conclusion to the one reached by the Corte di Cassazione on the existence of a customary rule regarding denial of state immunity in the event of *jus cogens* violations. It is therefore highly unlikely that the ICJ will endorse the Italian position and recognize that a rule of customary international law with this specific content has already emerged. This should also leave little doubt as to the futility of invoking a *jus cogens* exception in the U.S. context. As highlighted above, the *jus cogens* argument has so far enjoyed little success in ATS cases. Even in the event that a rule of customary international law denying state immunity should emerge in the future, the path to its direct applicability in U.S. courts would nevertheless prove difficult, due to the still unsettled issue of the place of custom in the U.S. legal system.[80] The absence of an explicit exception for *jus cogens* violations would appear to be an insurmountable obstacle to denying sovereign immunity in cases of gross human rights violations. In the past, efforts have been made to amend the FSIA so as to include an express "human rights exception," but have proven fruitless.[81] Without such an amendment to the FSIA approved by Congress, states committing *jus cogens* violations will continue to successfully shield themselves behind sovereign immunity.

80. On the hotly contested issue of the domestic status of customary international law in the U.S., *see* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Eire, 120 HARV. L. REV. 870 (2007).

81. *See* Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403, 405, 418-432 (1995).